

the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 96-52

In the Matter of

Amendment of Section 73.202(b), RM-8755
Table of Allotments,
FM Broadcast Stations.
(Princeville, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1996; Released: March 21, 1996

Comment Date: May 13, 1995

Reply Comment Date: May 28, 1996

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of John Moore d/b/a Moore Broadcasting Company ("petitioner") seeking the allotment of Channel 260C1 to Princeville, Hawaii, as that community's second local FM service.

2. In support of its proposal, petitioner states that as one of two applicants for Channel 255C1 at Princeville, its application (File No. BPH-950117MG) is mutually exclusive with that of Vetter Communications Co. Inc. (BPH-950119MF). Therefore, as a means of eliminating the conflict between the two cut-off applications at Princeville, petitioner avers that the additional allotment of Channel 260C1 would accommodate each applicants' request for a Class C1 channel while simultaneously avoiding a comparative hearing for Channel 255C1.¹ In further support of its proposal, petitioner states that presently no basis exists upon which to designate the applications for a comparative hearing or to otherwise resolve the mutual exclusivity, citing *Bechtel v. Federal Communications Commission*, 10 F.3d 875 (74 RR 2d 348) (D.C. Cir. 1993). Therefore, petitioner requests that it be afforded cut-off protection and that its application be amended to specify the new channel, consistent with prior Commission precedent, citing *Albion, Nebraska*, 10 FCC Rcd 3183 (1995), *rev. denied*, 10 FCC Rcd 11927 (1995); *Lander, Wyoming*, 46 FR 39605, August 4, 1981. In the event other expressions of interest for a Class C1 channel at Princeville are filed in this proceeding, petitioner advises that Channel 232C1 is also available to the community.² Petitioner urges that grant of its proposal would result in the settlement of the mutually exclusive application proceeding for Channel 255C1 at Princeville,

thereby reducing the time, cost and uncertainty of protracted litigation, citing *RKO General, Inc.*, 3 FCC Rcd 5057 (1988).

3. In light of the above, we believe the petitioner's proposal merits consideration since it could provide a second local FM service to the community. Additionally, the proposed allotment of Channel 260C1 to Princeville would accommodate each applicants' request for a Class C1 channel while avoiding a comparative hearing for Channel 255C1. Channel 260C1 may be allotted to Princeville in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules without the imposition of a site restriction at coordinates 22-00-00 and 159-22-50. As an additional equivalent channel is presently available for other expressions of interest at Princeville, (see n.2, *supra*), we will propose to permit petitioner to amend its application (File No. BPH-950117MG) to specify operation on Channel 260C1 with cut-off protection.

4. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Princeville, Hawaii, as follows:

	Channel No.
City	Present Proposed
Princeville, Hawaii	255C1 255C1, 260C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 13, 1996**, and reply comments on or before **May 28, 1996**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Cary S. Tepper, Esq.
Booth, Freret & Imlay, P.C.
1233 - 20th Street, N.W.
Suite 204
Washington, D.C. 20554

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

¹ Petitioner advises that Vetter Communications Co., Inc., the petitioner's competitor for Channel 255C1 at Princeville, has consented to the instant proposal.

² A staff review confirms that Channel 232C1 may also be allotted to Princeville, Hawaii, without a site restriction at coordinates 22-00-00 and 159-22-50.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.